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Other alleged errors in the admission of evidence, and the giving of instructions, were assigned and argued, but it is believed that the views herein expressed render a separate consideration of them unnecessary. For the error before alluded to the judgment is reversed, and the cause remanded.

Reversed.

Supreme Court of Missouri.

STATE OF MISSOURI v. ABERNATHY.

Statutes are generally to be construed so as not to include the state or affect its rights unless it is specially named, or it is clear that it was intended to be included.

Although the general rule in the construction of statutes, in cases where the state is a party to the suit, is as above stated, yet under the Homestead Act of Missouri exempting certain property from execution, a homestead acquired before the right of action accrued to the state, and not exceeding the statutory exemption, is exempt from execution issued in favor of the state, it being included by implication in the act, and the intention so to include the state, being apparent from analogous legislation.

ERROR to Circuit Court of Ballinger county. The facts are set forth in the opinion of the court.

B. Benson Cahoon, for plaintiff in error.

I. The statutes of Missouri nowhere direct, that in criminal *proceedings of bail*, no person shall be accepted as bail who is not possessed of property greater than the amount exempt by law from execution: *Wagner's Statutes of Mo.* 1078, § 30.

II. The enforcement of the Homestead Law against the state, in cases like the one at bar, would interfere with and retard the administration of criminal justice. Its enforcement in such cases is inessential to the sovereign capacity of the state: *Broom Leg. Max.* 5th Am. Ed. 372; and a sound public policy requires that the state be held not subject to the operation of *exemption laws*, unless *expressly* named in such statutes.

III. A proceeding by *scire facias*, upon a forfeited recognisance, is not a civil action, within the meaning of the Practice Act; but a mere continuation of an existing proceeding, which was criminal in its nature: *State v. Randolph*, 22 Mo. 474.

The statute of Missouri providing for the relief of insolvents, confined on criminal process (*W. S.* 1125), in default of the payment of any costs or fines, on account of any criminal proceeding, *expressly negatives* the exemption of property in such cases, by providing that the person so committed shall render *all* his property (except the wearing apparel of himself and family), and that all the estate then or afterwards owned by such person, shall be liable to execution for the payment of such costs and expenses: *W. S.* 1125, §§ 1, 5, 10, 13. By analogy the appli-

cation is pertinent in this case: Ram on Legal Judg., Am. Ed. 1871, pp. 116, 117; and moreover, nothing is exempt for taxes due the state: W. S. 605, § 15.

IV. The general language used in the Homestead Act (W. S. 697, § 1) should not embrace, and ought not to apply, to executions issued in favor of the state. It is a principle of universal application, in the construction of statutes, that the state will not be considered included, *unless by express provision or necessary implication*: Sedg. on Con. and Stat. Law 395, and authorities there cited; Broom Leg. Max., 5th Am. Ed. § 72. The maxim, "*Roy n'est lie per ascun statute si il ne soit expressment nosme*," applies in the case at bar: Broom Leg. Max. § 70; and it was held to apply in the construction of the English Statute of Insolvency: Broom Leg. Max. § 72; Chit. Pre. Crown 366, 388; *Rex v. Coplund*, Hughes 204, 230; Vin. Abr. Stat. E. 10.

V. The Homestead Act exempting property from the satisfaction of debts, is a statute against common right, and should be strictly construed: Sedg. on Con. and Stat. Law 344 to 347; *Rue v. Alter*, 5 Denio 119; *Allen v. Cook*, 26 Barb. 347; *Obsen v. Nelson*, 3 Minn. 53.

VI. The maxim, "*argumentum ab inconvenienti plurimum valet in lege*," applies with force in the construction of the Homestead Act in this case: Broom Leg. Max. §§ 174, 175, and authorities there cited; for, to hold, that the state is included in the provisions of the act, would work a hardship upon criminals, and at the same time neutralize bail as a means of security to them from discomfort: Ram on Leg. Judg., Am. Ed. 1871, pp. 111 to 115.

VII. The statute of Missouri provides (W. S. 790, § 2) that judgments of courts of record are liens on all real estate of defendants, in counties in which they are rendered: *Hoyt v. Hayne*, 3 Wis. 752; *Allen v. Cook*, 26 Barb. 347; *Folsom v. Carlie*, 5 Minn. 333. There being a lien by the judgment of the Circuit Court, then the sale should not have been set aside, even though the state be included in the Homestead Act, for the sale, in such a case, should have been left intact, to protect the rights of the purchaser after the death of the parties entitled to the homestead—their arrival at age or abandonment of the premises as a homestead: Kelly's Mo. Probate Guide 361; W. S. 98, § 5. Such being the case, there was an interest in the property aside from the homestead, subject to execution.

A. C. Ketchum, for defendant in error.

The opinion of the court was delivered by

WAGNER, J.—The facts of this case are agreed upon, and the only question is, whether the owner of a homestead can claim exemption against an execution issued in favor of the state.

The defendant, Abernathy, was surety on a forfeited recognisance, on which the state obtained a final judgment, and caused execution to be issued. He was the head of a family and owned 120 acres of land, on which he resided, valued at less than \$1500, which was acquired previous to the time the obligation occurred. When the sheriff levied on the premises he claimed that they were exempt under the provisions of the Homestead Act; but they were sold, notwithstanding, and he then moved the court to set the sale aside, which motion was sustained. Had

the judgment been in favor of any one other than the state, it is conceded the property would not have been liable to be sold. But it is contended that the state is not bound by the statutory exemptions concerning homesteads.

The general rule in the construction of statutes is to interpret them so as not to embrace the sovereign power of the state, or affect her rights, unless she be specially named, or it be clear by necessary implication that she was intended to be included.

The legislature, in the provision of the law respecting homesteads, uses the broadest language and exempts from attachment and execution the homestead in all cases, except as therein provided: Wag. St. 691, § 1. The exceptions extend to certain specified cases, but no reservation is anywhere made in favor of the state.

As illustrative of the intention of the law-making powers, light may be thrown on the subject by reference to analogous legislation. In the chapter on executions (1 Wag. St. 603, § 9), it is declared that certain enumerated personal property shall be exempt from attachment and execution, but the state is not named in the act as being bound by the exemption. Still the legislature considered the state as being included the same as an individual, for we find that in section 15 it is declared that nothing contained in the chapter shall be construed so as to exempt any property from seizure and sale for the payment of taxes due the state, or any city or county thereof, showing clearly that it was the intention to include the state, and that the property may be seized by the state only in the specified instance provided for in the 15th section. The language employed in making the exemption is the same in both the execution and homestead acts.

The acts are in kindred subjects—in *pari materia*—and may be construed together. They have a common object in view. In the one case it is to allow the family for their comfort and support to keep certain necessary articles of which they cannot be deprived; in the other, to have a secure and permanent home, free from the attacks of all creditors. From the language used in the enactment, and the history of our legislation on the subject, I think the state is included by implication, and that she does not stand in an attitude different from any other creditor.

The judgment must therefore be affirmed.

ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF ILLINOIS.¹

SUPREME COURT OF MARYLAND.²

SUPREME JUDICIAL COURT OF NEW HAMPSHIRE.

SUPREME COURT OF NEW YORK.⁴

ATTORNEY. See *Infant*.

BILLS AND NOTES. See *Partnership*.

Consideration—Illegality and Failure of.—The plaintiff sold to A. and

¹ From Hon. N. L. Freeman, Reporter; to appear in 57 Ills. Rep.

² From J. S. Stockett, Esq., Reporter; to appear in 36 Md. Rep.

³ From the Judges; to appear in 51 N. H. Rep.

⁴ From Hon. O. L. Barbour; to appear in Vol. 63 of his Reports.